

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

U N I T E D   S T A T E S ,	)	FINAL BRIEF ON BEHALF OF
Appellee	)	APPELLANT
	)	
v.	)	
	)	Crim. App. Dkt. No. 20100417
Specialist (E-4)	)	
<b>WALTER S. COLEMAN,</b>	)	
United States Army,	)	USCA Dkt. No. 13-0007/AR
Appellant	)	

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<b>Walter S. Coleman,</b>	)	
United States Army	)	
	)	
Appellant	)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES:

**Granted Issue Presented**

WHETHER THE MILITARY JUDGE ERRED IN FAILING  
TO GRANT A DEFENSE MOTION FOR MISTRIAL BASED  
ON THE TRIAL COUNSEL'S FAILURE TO DISCLOSE  
THAT APPELLANT'S CO-ACCUSED TESTIFIED  
AGAINST HIM IN EXCHANGE FOR THE STAFF JUDGE  
ADVOCATE'S RECOMMENDATION THAT HIS SENTENCE  
BE REDUCED BY TWELVE MONTHS.

**Statement of Statutory Jurisdiction**

The Army Court of Criminal Appeals (Army Court) had  
jurisdiction over this matter pursuant to Article 66, Uniform  
Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006). This  
Honorable Court has jurisdiction over this matter under Article  
67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

### **Statement of the Case**

On May 13-14, 2010, an enlisted panel sitting as a general court-martial tried Specialist (E-4) Walter S. Coleman (appellant). Appellant was convicted, contrary to his pleas, of rape and adultery, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. § 920 and 934 (2006 and Supp. IV 2010). (R. at 485).

The panel sentenced appellant to ten years confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a dishonorable discharge. (R. at 554). The convening authority approved five years confinement, reduction to the grade of E-1, and a dishonorable discharge. (Action).

The Army Court set aside the Specification of Charge III (adultery), affirmed the remaining findings of guilty, and affirmed the sentence on July 9, 2012. See *United States v. Coleman*, ARMY 20100711, 2012 WL 2756004 (Army Ct.Crim.App. July 9, 2012) (JA 7-15).

On November 5, 2012, this Court granted Appellant's Petition and ordered Briefs filed under Rule 25. Appellant, through counsel, herewith files his Brief and Joint Appendix.

### **Statement of Facts**

In the afternoon and evening of July 26, 2009, appellant attended a neighborhood party with D.D. and various other friends. (JA 41). After drinking and dancing together for several hours, appellant had sexual intercourse with D.D. (JA

49). The next morning, following a lengthy discussion, a friend brought D.D. to the emergency room. (JA 61). D.D. reported that she was concerned that she may have been sexually assaulted. (JA 186).

At trial, appellant faced alternative theories of criminal liability for his conduct towards D.D. The prosecution argued that D.D. was either too incapacitated to consent to sexual intercourse or that appellant forced D.D. to engage in sexual intercourse "by using strength and power sufficient that she could not avoid or escape the sexual contact." (JA 1).

During her direct examination, D.D. described steadily drinking "Captain Morgan and vodka" drinks from approximately 1500 until around 2100. (JA 43). At that point, D.D. felt "tipsy" and testified she felt like she was going to fall off the barstool on which she was sitting. (JA 44). D.D. eventually resumed drinking, taking several shots from a bottle of alcohol. (JA 46).

D.D. claimed to have only intermittent memories of the next few hours. She remembered "falling on the ground," and appellant wiping something off her stomach. (JA 46-47). D.D. remembered walking to her home, seeing her son, and being upstairs with appellant and Private First Class (PFC) Jarvis Pilago. (JA 47-48). D.D. testified that appellant got on top of her and that he was "putting something in [her]." (JA 49).

At the same time, PFC Pilago was "placing his privates in [her] mouth." (JA 49).

D.D. stated that she told appellant and PFC Pilago to "stop." (JA 49). Although PFC Pilago stopped what he was doing, appellant allegedly said "that don't mean shit" and continued to have sexual intercourse with D.D. (JA 58). Private First Class Pilago then continued to force D.D. to perform oral sodomy. (JA 58).

On cross-examination, the defense counsel questioned D.D.'s credibility. D.D. conceded that she had only eight to ten drinks the entire night, including the shots she took from the bottle of alcohol. (JA 78). She admitted that she was capable of walking, communicating, and making rational decisions as late as 2000 hours on the night of the alleged assault. (JA 88). D.D. also conceded that she had not previously claimed feeling so drunk that she was going to fall off the bar stool. (JA 90).

On May 12, 2010, one day before the appellant's court-martial, PFC Pilago was convicted, contrary to his pleas, of forcible sodomy and adultery for his role in the alleged incident. (JA 366). Private First Class Pilago was sentenced to confinement for forty-two months and a dishonorable discharge. (JA 366).

The prosecution called PFC Pilago to corroborate D.D.'s testimony. Prior to his testimony, defense counsel made a

motion in limine to "prevent PFC Jarvis Pilago from both testifying that he was convicted and that he received a sentence, and the length of that sentence." (JA 125). Defense counsel elaborated that "a conviction would be appropriate impeachment for the defense, but not necessarily the specific act that he was convicted of." (JA 126). The military judge granted the defense motion. (JA 126).

Additionally, immediately prior to calling PFC Pilago to the witness stand, defense counsel specifically asked government counsel if there was a deal in place with PFC Pilago. (JA 240-45, 324). The trial counsel responded "No, there's nothing in writing." (JA 324). The military judge noted that he found trial counsel's response "troubling." (JA 244).

In a two-page direct examination, trial counsel asked PFC Pilago to confirm D.D.'s claim that she had said "Stop." (JA 128). Private First Class Pilago testified: "I turned to [appellant], 'Dude, she said stop.' After the first one, I got no response. Then, I said it again, 'Dude, she said stop.' [The appellant] told me just to keep going." (JA 128).

Defense counsel's cross-examination of PFC Pilago focused on two themes: (1) D.D. was not substantially incapacitated when she engaged in sexual intercourse with appellant; and (2) prior to the charged incident, appellant and PFC Pilago had engaged in sexual intercourse and oral sodomy with D.D. on the lawn outside

her house and in PFC Pilago's bedroom, thus providing a motive to fabricate as well as a potential mistake of fact as to consent defense. (JA 130-31, 143-48). Private First Class Pilago testified that D.D. was capable of walking without stumbling immediately prior to the alleged assault; that she was not slurring her words; that she was able to open her own door and navigate the stairs; and that she was actively participating in the sexual activity. (JA 130-31, 143-48).

Defense counsel did not impeach PFC Pilago with his conviction. Instead, during his closing argument, defense counsel told the panel:

[The judge] talked about accomplice testimony. He said, in essence, be wary of accomplice testimony because of the benefits that someone may receive from them; the benefits of immunity; and the benefits of potentially receiving some sort of clemency from the Commanding General in his own case. I am not asking the panel to do something unreasonable. So, what I'll tell you is that Jarvis Pilago testified to a lot of different things. I'm asking you to consider the evidence he gave to the government is the evidence that is going to help him with his clemency.

(JA 224).

Defense counsel contrasted the evidence the government elicited during PFC Pilago's direct testimony with "what the defense elicited, the stuff that doesn't help Pilago get anything, the stuff that may actually hurt him." (JA 226).

The panel subsequently convicted appellant of rape and adultery. (JA 232). Following the court-martial, defense counsel discovered that PFC Pilago's testimony was in exchange for the staff judge advocate's recommendation that the convening authority reduce his sentence by twelve months. (JA 235).

On December 14, 2010, the convening authority ordered a post-trial hearing to determine: "(1) what agreement existed between the government and PFC Pilago (and or his defense counsel) concerning his testimony as a government witness in U.S. v. Coleman; (2) when did SPC Coleman (and or his defense counsel) become aware of this agreement; and (3) any other issues deemed relevant by the military judge." (JA 249)

On January 5, 2011, the military judge held a post-trial Article 39(a), UCMJ session. (JA 254). Several government witnesses confirmed the existence of an unwritten agreement between the staff judge advocate and PFC Pilago. In exchange for his testimony, the staff judge advocate "made a promise to [PFC Pilago's defense counsel] that [he] would recommend 12 months clemency on the confinement that Private Pilago received." (JA 301). Trial counsel failed to inform the defense of the existence of this unwritten agreement, despite a specific defense discovery request for "immediate disclosure of any agreement with SPC Jarvis Joshua Pilago to cooperate with the government in any way," and despite the defense counsel's

specific question posed to the trial counsel immediately prior to PFC Pilago's trial testimony. (JA 22, 279-80, 295, 324).

At the conclusion of the hearing, defense counsel requested a mistrial based on "nondisclosure of both material and favorable information to the defense in violation of Military Rules of Evidence 301, 701, and *Brady*." (JA 326-27). Defense counsel argued that PFC Pilago's testimony was "extraordinarily aggravating" both on the merits and for sentencing. (JA 335). He elaborated on the prejudice to his client, noting that:

Had the defense known about that deal, we would have been able to impeach with that information, "Isn't it true that your testimony today is being given in exchange for a recommendation from the Staff Judge Advocate for 12 months off of your sentence?" Your Honor, we made specific trial decisions based on not knowing that that existed. One trial decision was to preclude the government from talking about his conviction. We did not want the panel to hear about that conviction if we didn't know about a deal . . . it looks as if, without a deal in place that he's [testifying] out of the goodness of his heart . . . More importantly without the impeachment evidence, he came across credible, which makes him a corroborating witness with the victim, which means Specialist Coleman's decision to testify may very well have been affected by how that testimony went.

(JA 336).

In his findings of fact, the military judge noted that neither the trial counsel nor the assistant trial counsel

specifically disclosed to the defense "that PFC Pilago had an oral agreement with the staff judge advocate to recommend to the convening authority that PFC Pilago's sentence be reduced to 30 months if he cooperated in U.S. v. Coleman." (JA 241).

Instead, "defense learned of the clemency agreement after the findings and sentencing portion of U.S. v. Coleman." (JA 242). The military judge concluded that the clemency recommendation was "favorable and material to defense trial preparation and should have been disclosed." (JA 243).

The military judge nonetheless described the government's failure to disclose PFC Pilago's clemency agreement as harmless beyond a reasonable doubt. (JA 244). The military judge based his conclusion on what he characterized as defense counsel's "tactical decision" to not impeach PFC Pilago on the damaging aspects of his testimony:

The court finds, defense counsel's failure to inquire further [into the existence of a possible agreement] to be evidence of the defense counsel's tactical decision to employ a different strategy than to directly impeach PFC Pilago with his conviction and clemency. Instead, defense counsel chose to get the valuable testimony he could from PFC Pilago, and, after instructions on credibility and accomplice testimony, play the clemency card.

(JA 244).

The military judge cited the "value" of not impeaching PFC Pilago, "particularly when one considers the prior consistent

statement that PFC Pilago provided to CID on [July 29, 2009], approximately 3 days after the alleged assaults." (JA 244).

### **Summary of the Argument**

The military judge abused his discretion by failing to grant a defense motion for mistrial based on the government's failure to disclose that appellant's co-accused, PFC Pilago, testified against him in exchange for the staff judge advocate's recommendation that his sentence be reduced by twelve months. The military judge's conclusion that the trial counsel's non-disclosure was harmless beyond a reasonable doubt was improperly based upon: (1) what he speculatively characterized as defense counsel's "tactical decision" not to impeach PFC Pilago on damaging aspects of his testimony; (2) the adoption of PFC Pilago as a defense witness; and (3) the defense argument in closing that portions of his testimony were given in hopes of future clemency from the convening authority. In addition, the military judge assumed, with no factual basis, that PFC Pilago's prior statement to CID had particular significance without making findings of fact or conclusions of law concerning its admissibility.

The Army Court erroneously relied on the military judge's speculation concerning the defense counsel's tactical decisions and on the assumption that PFC Pilago's prior statement would be admissible. However, the military judge and Army Court failed

to fully consider that the defense had no opportunity to object to the statement or mount an argument against its admissibility and that the defense counsel was forced to make those tactical decisions based on trial counsel's blatantly false representation. The Army Court improperly concluded that had the defense sought to impeach PFC Pilago using the clemency agreement with the staff judge advocate as motive to fabricate, the government could have responded by admitting PFC Pilago's prior consistent statement and described it as "highly damaging to defense." (JA 13).

#### **Granted Issue Presented and Argument**

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO GRANT A DEFENSE MOTION FOR MISTRIAL BASED ON THE TRIAL COUNSEL'S FAILURE TO DISCLOSE THAT APPELLANT'S CO-ACCUSED TESTIFIED AGAINST HIM IN EXCHANGE FOR THE STAFF JUDGE ADVOCATE'S RECOMMENDATION THAT HIS SENTENCE BE REDUCED BY TWELVE MONTHS.

An appellate court "will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). A military judge abuses his discretion when his "findings of fact are clearly erroneous, the court's decision is influence by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Webb*, 66 M.J. 89, 93 (C.A.A.F. 2008).

The military judge abused his discretion in denying the defense motion for a mistrial because he based the decision on an erroneous ruling that the non-disclosure was harmless beyond a reasonable doubt. The military judge based his ruling on clearly erroneous factual conclusions which were neither in evidence nor fair inferences from the evidence. Based on those conclusions, the military judge incorrectly ruled that the government met its burden in proving that the non-disclosure was harmless beyond a reasonable doubt. Finally, the Army Court made assumptions not supported in the record in affirming the military judge's ruling.

**A. The military judge erred in concluding that non-disclosure was harmless beyond a reasonable doubt.**

The military judge correctly characterized the existence of a clemency agreement between PFC Pilago and the Staff Judge Advocate as "favorable and material" evidence that should have been disclosed to the defense. (JA 243).

**1. The Government must prove a Brady R.C.M. 701(a) (6) violation is harmless beyond a reasonable doubt.**

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The President

implemented the Supreme Court's rationale and decision in *Brady* within the military justice system by promulgating Rule for Courts Martial (R.C.M.) 701(a)(6), which states in pertinent part that:

The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) negate the guilt of the accused of an offense charged; (B) reduce the degree of guilt of the accused of an offense charged; or (C) reduce the punishment).

If a constitutional *Brady* violation occurs, the appellant must show that there was a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitney*, 514 U.S. 419, 433 (1995); see also *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999).

A servicemember's right to discovery, however, is even broader than afforded in civilian courts. "[E]qual opportunity to obtain evidence under Article 46, UCMJ, as implemented by the President in the Rules for Courts-Martial, is a 'substantial right' of a military accused within the meaning of Article 59(a), UCMJ, independent of due process discovery rights provided by the Constitution." *United States v. Adens*, 56 M.J. 724, 732 (A. Ct. Crim. App. 2002). Accordingly, even if a particular discovery violation does not arise to a

constitutional error, the nondisclosure must still be tested under the material prejudice standard in Article 59(a), UCMJ. "[W]hen a trial counsel fails to disclose information pursuant to a specific request, the evidence is considered material unless the government can show that failure to disclose was harmless beyond a reasonable doubt." *Adens*, 56 M.J. at 733. See also *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) (citing *United States v. Roberts*, 59 M.J. 322, 327 (C.A.A.F. 2004)).

**2. The military judge made incorrect conclusions of law.<sup>1</sup>**

**a. The military judge's conclusion that defense counsel willfully remained ignorant is completely speculative and wrong.**

The military judge assigned some significance to the unsupported conclusion that defense counsel failed to "inquire further" after trial counsel indicated that there was no deal "in writing." (JA 244). The military judge interprets defense counsel's failure to question the trial counsel as "evidence of the defense counsel's tactical decision to employ a different strategy than to directly impeach PFC Pilago with his conviction and clemency." *Id.* This conclusion implies that defense counsel was so committed to not impeaching PFC Pilago that he

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<sup>1</sup> Even if this Court determines that the conclusions are findings of fact, the military judge's findings of fact are clearly erroneous as they are not based on evidence before the court nor are they fair inferences from evidence before the court. See *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007).

preferred to remain ignorant of the clemency agreement, specific discovery request notwithstanding. The military judge's conclusion defies logic; if defense counsel's failure to "follow up" is indicative of his mindset, surely the fact that he asked about the existence of a deal is even more so. It also ignores the timing of a second request for disclosure, just moments before PFC Pilago entered the court-room to testify.

Defense counsel was aware of the significant role PFC Pilago would play in the appellant's trial. To prepare for his testimony, defense counsel specifically requested "immediate disclosure of any agreement" with PFC Pilago to "cooperate with the government in any way." (JA 25). Defense counsel added this nonstandard language to the discovery request and placed it in bold to emphasize the importance of this potential impeachment evidence. (JA 25). As the Supreme Court has said:

A specific request for nondisclosed evidence bolsters the defense case, because an incomplete response to a specific request not only deprives the defense of certain evidence, but has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued ... And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and

trial decisions on the basis of this assumption.

*United States v. Bagley*, 473 U.S. 667, 682-83 (1985).

The importance of such a clemency agreement was again demonstrated during the Article 39(a), UCMJ session immediately preceding PFC Pilago's testimony. While there may have not been a written agreement in place at the time of the session, there was a verbal agreement between PFC Pilago and the staff judge advocate, the general court-martial convening authority's legal representative. Defense counsel specifically asked if there was a deal in place with PFC Pilago. The trial counsel's response was misleading in that it implied that there was no deal of any kind. This was a second specific request for disclosure of any agreement with PFC Pilago concerning his testimony.

**b. The military judge's conclusion that defense counsel's trial strategy was not to impeach PFC Pilago with his conviction and clemency is incorrect.**

As a result of the trial counsel's failure to disclose the agreement and the affirmative misrepresentation moments before PFC Pilago's testimony, the defense counsel made a tactical decision in how to question the witness based on false information. The military judge noted that this answer was "troubling" and then cast his concerns aside to erroneously conclude that the non-disclosure was harmless beyond a reasonable doubt. (JA 244-45).

The military judge's erroneous conclusions of law rest on his implicit assumption that defense counsel faced a choice of two mutually exclusive tactics: (1) elicit favorable testimony from PFC Pilago concerning D.D.'s prior consensual sexual encounters with the appellant and her level of intoxication; or (2) "confront" PFC Pilago on his testimony that the appellant continued to engage in sexual intercourse with D.D. despite the fact that she told him to stop. (JA 244). The military judge apparently viewed defense counsel's choice to elicit favorable testimony from PFC Pilago as the equivalent of an affirmative decision not to question his credibility on cross-examination. In so doing, the military judge ignored that "possession of [the non-disclosed leniency agreement] may have altered [appellant's] trial strategy . . . ." *Webb*, 66 M.J. at 93.

Contrary to the military judge's simplistic view of the case, defense counsel had multiple options for dealing with PFC Pilago's testimony. As defense counsel explained to the military judge, the decision not to confront PFC Pilago was based on the fact that the government represented there was no deal. (JA 336). Had defense counsel known a deal was in place, he would have been able to weigh his tactical options in a meaningful and informed manner. Instead, he made a tactical decision based on incorrect information, which can hardly be called a tactical decision at all. In addition, any discussion

of PFC Pilago's conviction, without use of a clemency agreement, carried the risk of suggesting to the panel that the appellant, as a co-actor in the same incident, should also carry a federal conviction for his conduct.

The existence of an agreement for clemency alleviates these concerns. As the Supreme Court has recognized, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). At trial, defense counsel was forced to argue that PFC Pilago's testimony was motivated by the hope that it would "help him with his clemency." (JA 224). This argument, while suggestive of a potential bias in favor of the government, is in no way as strong as an argument predicated on the existence of an actual agreement to recommend leniency in return for testimony. As defense counsel pointed out to the military judge, trial counsel's failure to disclose the agreement prevented him from arguing that PFC Pilago was testifying, not from a sense of remorse and a generalized hope of receiving clemency, but in an effort to secure a twelve-month reduction in his sentence as the installation staff judge advocate promised. (JA 336).

By framing defense counsel's trial strategy as a choice between two approaches, the military judge discounted the underlying prejudice that defense counsel's strategy was based

upon the trial counsel's misleading information. While the defense counsel did the best he could with what he knew, his lack of knowledge of a critical fact forced the choice. Defense counsel could have also elicited whatever testimony he considered favorable for his client and impeached PFC Pilago with his agreement to testify in exchange for clemency. As defense counsel pointed out to the military judge, PFC Pilago's motive to fabricate is only relevant to his testimony in support of the prosecution's case; he had no motive whatsoever to provide misleading testimony for the defense. (JA 226). The panel would have appreciated this distinction and assessed PFC Pilago's credibility accordingly.

The Army Court similarly noted that defense counsel's strategy was such that he "chose not to cross-examine PFC Pilago as to the motive of self-preservation and instead adopted him as a defense witness and then waited until closing to argue by inference that portions of PFC Pilago's testimony were given in the hope of clemency." (JA 9-10). The Army Court relies, in part, on this analysis of the defense counsel's strategy in determining that the error was harmless beyond a reasonable doubt.

Like the military judge, the Army Court ignored that the government did not comply with its duty and turn over the impeachment material. "Possessing this evidence may have

altered [appellant's] trial strategy . . ." and is thus not harmless beyond a reasonable doubt. *Webb*, 66 M.J. at 93. The defense could have easily concluded that it was more important to attack PFC Pilago's credibility than to adopt him as a defense witness to elicit favorable testimony. Defense counsel's statements make clear that the strategy, which was ultimately implemented, was decided upon after considering the information they had available. Those considerations could have yielded different decisions had defense counsel been fully informed and been given the information that the government, the military judge, and the Army Court acknowledge the appellant had a right to have. The fact that defense counsel mounted a defense without the requested information does not inform the question of whether the nondisclosure was harmless. It ignores the critical changes in strategy the defense may have undertaken if the government had complied with its duty.

**B. The government cannot show that failure to disclose PFC Pilago's deal was harmless beyond a reasonable doubt.**

The government failed to carry its burden to show that the nondisclosure of PFC Pilago's clemency agreement with the staff judge advocate was harmless beyond a reasonable doubt. In *United States v. Dobson*, the Army Court analyzed the impact of the government's nondisclosure of impeachment evidence in a premeditated murder case. The Army Court cited three reasons in

support of its finding that the nondisclosure was harmless beyond a reasonable doubt: (1) the investigator in question played a minor role in the case; (2) his testimony was consistent with a prior sworn statement; and (3) the prosecution's evidence was "extensive and overwhelming." *United States v. Dobson*, ARMY 20000098, 2010 WL 3528822 (Army Ct. Crim. App. 2010) (unpublished) (JA 368-74). Although unpublished, the Army Court's analysis in *Dobson* provides a framework with which to analyze the issue presented here.

**1. PFC Pilago was a critical witness to the case.**

Although the military judge's conclusions suggest that he applied a similar analysis, they are largely unsupported. Unlike the investigator in *Dobson*, PFC Pilago was undisputedly a critical witness in the appellant's case. His testimony corroborated the critical facts underlying the appellant's conviction for rape. Without PFC Pilago, the government's only evidence of rape by force would have been D.D.'s admittedly scattered recollection of the assault. Even if the military judge's finding that "D.D. not PFC Pilago was the key government witness" is correct, PFC Pilago's testimony was certainly vital to the government's case. (JA 243).

PFC Pilago corroborated the critical facts underlying the appellant's conviction for rape: that the appellant was having sexual intercourse with D.D. when she told him to stop, that PFC

Pilago repeated what she had said to the appellant, and that the appellant told him to "just keep going."<sup>2</sup> (JA 128). Without the benefit of his testimony, the government would have had to rely on D.D.'s problematic account of assault. Her testimony, alone, would have been insufficient to support a conviction on either of the government's theories; D.D. was unable to establish key elements of the charged offenses, including whether or not sexual intercourse actually occurred and whether her alcohol consumption rose to the level of substantial incapacitation. (JA 88-92; 95-99; 103).

In addition to shoring up D.D.'s piecemeal account of the rape, PFC Pilago essentially eviscerated the appellant's potential mistake of fact defense.<sup>3</sup> Although PFC Pilago testified to the appellant's prior consensual activity with D.D. earlier that night, the defense was unable to offer any evidence that the appellant believed D.D. was consenting to sexual

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<sup>2</sup> The military judge's finding that "[D.D.] and not PFC Pilago was the key government witness" unreasonably minimizes his role in the trial. D.D. conceded that her memories of the evening were intermittent at best, leaving her with no recollection of the events immediately preceding the alleged assault. (JA 46-49).

<sup>3</sup> The military judge placed undue weight on the fact that PFC Pilago "enabled the defense as an adopted witness to present evidence that consensual sexual acts took place between D.D., PFC Pilago, and SPC Coleman." (JA 244). The benefit to the defense was in no way "similar" to the advantage PFC Pilago's testimony brought to the government; the defense's evidence of a mistake of fact defense would have been weighed by the panel against PFC Pilago's insistence that he heard D.D. tell the appellant to stop what he was doing.

intercourse after she told him to stop. Even if the appellant testified at trial, PFC Pilago made it clear to the panel he was concerned enough about D.D.'s wishes to repeat what she said to the appellant. (JA 128). When PFC Pilago returned to engaging in oral sodomy with D.D., he did so because the appellant told him to keep going, not because he was convinced that D.D. was consenting. *Id.* Following PFC Pilago's testimony, there was very little likelihood that the panel would believe the appellant had a reasonable mistake of fact as to consent.

The military judge's finding that D.D. and not PFC Pilago was the key government witness also completely ignores the fact that the staff judge advocate considered PFC Pilago's testimony critical enough to agree to recommend a twelve-month reduction in his sentence to confinement to the convening authority in exchange for that testimony. This agreement notably came after PFC Pilago was convicted of similar offenses in contested proceedings in which he forced the government to prove the case against him. For the staff judge advocate to then agree to recommend significant clemency in exchange for his testimony shows how important the government considered him to be as a witness.

**2. While PFC Pilago's testimony was consistent with a prior sworn statement, his motivation and status as co-conspirator raise concerns as to the reliability of the blame-shifting statement.**

The Army Court gave significant weight to appellee's argument that even if defense counsel were made aware of the agreement and attempted to impeach PFC Pilago with it, the government would successfully introduce PFC Pilago's "prior consistent statement." The Army Court characterized this statement as "highly damaging." (JA 13). The military judge and the Army Court both assume that the statement was admissible and that defense counsel would not have developed a strategy to, first, object to its admissibility, and second, minimize its impact should it be admitted. Because the government never offered the statement, the defense never had an opportunity to object to its admissibility. Both the military judge and the Army Court's argument otherwise is completely speculative.

Both the military judge and the Army Court erroneously assumed that PFC Pilago had no motive to testify falsely prior to entering into his agreement with the Staff Judge Advocate. In reality, PFC Pilago had a strong motive to minimize the extent of his own misconduct and to incriminate the appellant dating from his initial interview with CID on July 29, 2009. "If a witness is impeached by a showing of bias, prejudice, or motive to testify falsely, a prior consistent statement may be

shown . . . only if the statement is made at a time prior to the fact which indicates bias, prejudice, or a motive to testify falsely." *United States v. Kauth*, 29 C.M.R. 77, 81 (C.M.A. 1960); See also M.R.E. 801(d)(1)(B). When PFC Pilago made his "prior consistent statement," he was aware that CID considered him a suspect. He had a strong motive to shift the focus to the appellant by exaggerating the same facts that he later testified to at trial, i.e. that PFC Pilago was troubled by D.D. telling him to stop and would have done so had the appellant not told him to continue. (JA 128). "Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force for the simple reason that mere repetition does not imply veracity." *United States v. McCaskey*, 30 M.J. 188, 191 (C.M.A. 1990). PFC Pilago's clemency agreement simply bolstered an existing motive to fabricate; having already made a statement consistent with his instinct for self-preservation, PFC Pilago had every reason to adhere to his original account of the alleged assault.

**3. The prosecution evidence was weak, solely based on D.D., a non-credible witness.**

The Supreme Court has characterized blame-shifting prior-statements of accomplices, such as PFC Pilago's, as "presumptively unreliable," "viewed with special suspicion," and "inevitably suspect." *Lilly v. Virginia*, 527 U.S. 116, 119

(1999) (citations omitted). The military judge and Army Court's conclusion that PFC Pilago's prior statement would have been admissible ignores this characterization and incorrectly assumes that it was reliable, and would pass the balancing test under Military Rule of Evidence 403. This conclusion does not support the Supreme Court's interpretation of such statements.

"One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Id.* at 133 (citation omitted). The evidence in this case was neither extensive nor overwhelming and was vulnerable to attack on the issue of reasonable doubt. Without PFC Pilago's testimony, the defense would have had a strong case for mistake of fact as to consent. First, defense counsel successfully admitted several photographs of D.D. dancing with the appellant, including one photograph with the appellant "having his head on [her] crotch." (JA 111). Second, despite conceding that she only consumed eight to ten drinks over a period of approximately nine hours, D.D. claimed not to remember key portions of the night, including having consensual sexual intercourse with both appellant and PFC Pilago earlier in the evening. (JA 75-78, 87, 94). PFC Pilago had no motivation to fabricate testimony on this issue in support of the appellant. Several aspects of his story were neither sought by the government nor helpful to its case. D.D. could not rebut

these claims, as this activity allegedly occurred during one of her memory lapses. Third, defense counsel successfully explored several inconsistencies between D.D.'s trial testimony and her prior statements, including the number of drinks she consumed; whether or not she had the appellant's phone number programmed into her phone; the fact that she never mentioned taking shots or feeling that she was going to fall off her barstool before; and she recalled being able to walk, communicate, and make rational decisions between 2000 and midnight. (R. at 74, 78, 80, 88).

**C. The Army Court rested its decision on erroneous factual assumptions.**

Despite the lack of findings of fact or conclusions of law from the military judge concerning PFC Pilago's prior statement, the Army Court assumed this statement was admissible, characterized it as highly damaging, and concluded that the defense counsel could not have developed an adequate strategy to respond to the statement should it be admitted. Just as the Army Court notes that defense counsel adopted a strategy for dealing with PFC Pilago's testimony, which was also highly damaging, defense counsel could similarly have developed a strategy for minimizing the impact of the prior statement if they were aware of the deal between the government and PFC Pilago. For the Army Court to assume that defense counsel would

not develop such an effective approach in concluding that the conceded error was harmless beyond a reasonable doubt was in error.

At trial, defense counsel was forced to argue that PFC Pilago's testimony was motivated by the hope that it would "help him with his clemency." (JA 224). This argument, while suggestive of a potential bias in favor of the government, is in no way as strong as an argument predicated on the existence of an actual agreement to testify.

As defense counsel pointed out to the military judge, trial counsel's failure to disclose the agreement prevented him from arguing that PFC Pilago was testifying, not from a sense of remorse and a generalized hope of receiving clemency, but in an effort to secure a twelve-month reduction in his sentence as the installation Staff Judge Advocate promised. (JA 336). The disclosure of such an agreement could also result in an additional instruction to the panel regarding witnesses testifying under a promise of leniency which could have influenced the panel's deliberations. Defense counsel could have used this instruction to argue more persuasively that PFC Pilago was biased against the appellant.

If defense counsel were aware of the existence of a clemency agreement between PFC Pilago and the Staff Judge Advocate, he could have made an educated decision about the

value of his testimony. Although this Court's decision in *United States v. Savala* involved a violation of the appellant's rights under the Confrontation Clause, the Court's dicta is equally applicable here. "The balance of factors on the question of prejudice requires consideration not only of the strength of the prosecution's case, but the potential vulnerabilities on the issue of reasonable doubt." *United States v. Savala*, 70 M.J. 70, 78 (C.A.A.F. 2011).

The testimony of PFC Pilago was critical to the government's case and the government, through trial counsel's affirmative misrepresentation, deprived the defense of a powerful mechanism by which to attack PFC Pilago's testimony. The Army Court's conclusion that this admitted constitutional error was harmless beyond a reasonable doubt ignores the prejudice of forcing a defense counsel to make tactical decisions based on blatantly false information, the strategies unavailable to defense counsel due to the government's failure to disclose constitutionally required information, and the presumptive unreliability of accomplice blame-shifting statements.

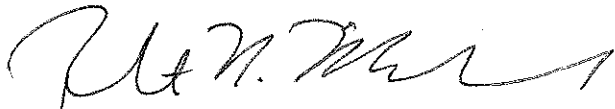
### **Conclusion**

The military judge's denial of the defense motion for a mistrial was based on his erroneous determination that the non-disclosure of the clemency agreement was harmless beyond a

reasonable doubt. This ruling focused not on the government's blatant failure to disclose information, which trial counsel acknowledged defense had a right to have, but on the strategic decisions the defense counsel made based on false information the trial counsel provided.

The military judge also erroneously shifted blame for the non-disclosure to the defense counsel by assuming that his supposed failure to inquire further into the existence of a clemency agreement, after two specific prior requests for disclosure, was part of an informed trial strategy. (JA 244). This analysis improperly shifts the burden for discovery of evidence and is directly contrary to both R.C.M. 701(a)(6) and the extensive case law interpreting a servicemember's right to discovery. The Army Court's decision to affirm appellant's convictions was also in error as it assumed that defense counsel would not develop a sufficient strategy to respond to evidence that might become relevant, if the government disclosed the agreement.

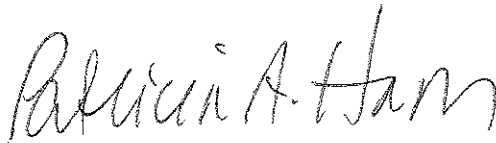
WHEREFORE, appellant respectfully requests this Honorable Court grant his petition for review.



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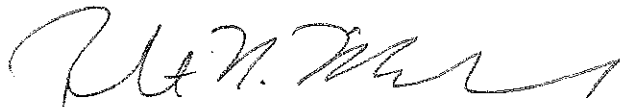
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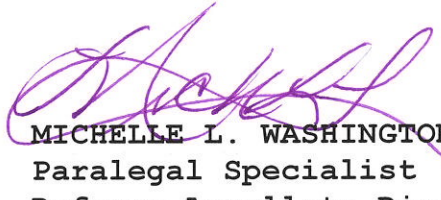
1. This brief complies with the type-volume limitation of Rule 21(b) because this brief contains 1,186 words.
2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface (12-point, Courier New font) using Microsoft Word, Version 2007.



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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing in the case of  
*United States v. Coleman*, Crim.App.Dkt.No. 20100417, USCA Dkt.  
No. 13-0007/AR, was electronically filed with both the Court and  
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